RECEIVED
Sep 11 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY

The Court of Common Pleas

Eugene C. Griffith, Jr., Judge

Case No. 2022-CP-24-01036
(Appellate Case No. 2024-000924)

Nancy S. Inman, Lisa Tolbert, and Vernell Humphries, ...Respondents,

v.

Sudie Dell Davis and Roosevelt Davis, ...Appellants.

INITIAL BRIEF OF APPELLANTS

Tommy L. Stanford
Attorney for Appellants
307 Main Street
Greenwood, South Carolina 29646
Mailing: Post Office Box 3321
Greenwood, South Carolina 29648
Phone: (864) 229-3987
Fax: (864) 229-6304

Juankell Shingles. Esquire
Attorney for Appellants
Post Office Box 49783
Greenwood, South Carolina 29649
Phone: (864) 376-0914
Fax: (864) 229-6304

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Standard of Review 7

ARGUMENTS

1. THE TRIAL COURT IMPROPERLY FAILED TO HOLD RESPONDENTS TO THEIR BURDEN TO ESTABLISH THE ABSENCE OF A TRIABLE ISSUE OF FACT AS TO WHETHER APPELLANTS' RESIDENCE WAS ON THE "REAL PORTION" OF THE LOT. 9

2. THE TRIAL COURT IMPROPERLY FAILED TO HOLD RESPONDENTS TO THEIR BURDEN TO ESTABLISH THE ABSENCE OF A TRIABLE ISSUE OF FACT AS TO THE SQUARE FOOTAGEOF THE RESIDENCE IN SITU. 11

3. THE TRIAL COURT MADE A PREMATURE AND IMPROPER CREDIBILITY DETERMINATION IN ITS FINDING THAT THE AFFIDAVITS OF CAROL COLEMAN AND APPELLANTS WERE INSUFFICIENT TO RAISE A TRIABLE ISSUE FACT AS TO THE SQUARE FOOTAGE OF THE APPELLANTS' RESIDENCE. 13

Conclusion 16

TABLE OF AUTHORITIES

CASES

Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009) 7

S.C. CVS Pharmacy v. KPP Hilton Head, 440 S.C. 360, 363, 890 S.E.2d 824, 825 (Ct. App. 2023) 7

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (quoting Rule 56[c]) 8

Callawassie Island Member Club, Inc. v. Martin, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022) 8

Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008) 8

Forrester v. Smith & Steele Builders, Inc., 291 S.C. 196, 200, 352 S.E.2d 522, 524 (Ct. App. 1986) (citing 73 Am.Jur.2d Summary Judgment Section 36 (1974) 8

Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990). 8

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). 8

Taylor v. Lindsey, 332 S.C. 1, 4–5, 498 S.E.2d 862, 863–64 (1998) 9

Marriott Corp. v. Combined Properties Ltd. Partnership, 239 Va. 506, 391 S.E.2d 313 (1990).... 9

S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). 9

Id,.Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) and 17A Am. Jur. 2d Contracts § 338, at 345 (1991)................................. 9

Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014)... 10

McDonald v. Welborn, 220 S.C. 10, 66 S.E.2d 327 (1951). 10

Priester v. Futuramic Tool & Eng'g Co., No. 2:14-cv-01108-DCN, 2017 U.S. Dist. LEXIS 43988, at *8 (D.S.C. Mar. 27, 2017) 11

Stratton v. Merck & Co., No. 2:21-02211-RMG, 2021 U.S. Dist. LEXIS 223915, at *7 (D.S.C. Nov. 17, 2021) 12

Hanwha Azdel, Inc. v. C&D Zodiac, Inc., 617 F. App'x 227, 233 n.1 (4th Cir. 2015) 12

Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) 12

Protective Life Ins. Co. v. Henderson, Civil Action No. 1:21-02789-MGL, 2023 U.S. Dist. LEXIS 81028, at *8 (D.S.C. May 8, 2023) 13

Pfaller v. Amonette, 55 F.4th 436, 450 (4th Cir. 2022) 13

Standard Fire Ins. Co., 301 S.C. at 422, 392 S.E.2d at 462. 14

Nicholls v. Andrus Transp. Servs., No. 51883-6-I, 2004 Wash. App. LEXIS 1257, at *7 (Ct. App. June 21, 2004) 15

State v. Shaw, 322 N.C. 797, 808, 370 S.E.2d 546 (1988) 15

State v. Sequin, 73 Haw. 331, 342-43, 832 P.2d 269 (1992) 15

Mineros v. London, No. A-1091-15T4, 2018 N.J. Super. Unpub. LEXIS 1431, at *13 (Super. Ct. App. Div. June 19, 2018) 15

Atlas v. Silvan, 128 N.J. Super. 247, 251, 319 A.2d 758 (App. Div. 1974) 15

Gretowski v. Hall Motor Exp., 25 N.J. Super. 192, 195-97, 95 A.2d 759 (App. Div. 1953) 15

S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). 16

Forrester, 291 S.C. at 200, 352 S.E.2d at 524 16

STATUTE

20 Am.Jur.2d Covenants § 171 (1995) 9

17A Am. Jur. 2d Contracts § 388, at 345 (1991) 9

STATEMENT OF ISSUES ON APPEAL

1. On summary judgment, did the Trial Court err by failing to hold Respondents to their burden to establish the absence of a triable issue of fact as to whether Appellants' Residence violated Provision 9 of the Restrictions by being located somewhere other than the "real portion" of the lot, and by improperly construing the record in the light least favorable to Appellants as non-movants?

2. On summary judgment, did the Trial Court err by failing to hold Respondents to their burden to establish the absence of a triable issue of fact as to whether Appellants' Residence violated Provision 2 of the Restrictions by having less than 1600 square feet?

3. On summary judgment, did the Trial Court err by making a premature and improper credibility determination in its finding that the Affidavits of Carol Coleman and Plaintiffs were insufficient to raise a triable issue of fact as to the square footage of the Appellants' Residence, and that the Residence therefore violated Provision 2 of the Restrictions by having less than 1600 square feet?

STATEMENT OF THE CASE

Appellants and Respondents are property owners in the Callison Estates Subdivision, located in Greenwood County, South Carolina. On October 28, 2024, Respondents commenced this action against the Appellants alleging breach of certain covenants and restrictions affecting Appellants' lot, and to enjoin the placement of a residence on Appellants' lot. (*Compl.* pp. 1-2; *Ans.* pp. 1-2). Appellants responded with a general denial (*Ans.* pp. 1-2) and asserted counterclaims of Declaratory Judgment, Civil Conspiracy, and Trespass, and Affirmative Defenses of Estoppel, Waiver and Laches. (*Ans.* pp. 2-5).

Respondents moved for summary judgment on September 29, 2023. (*Motion for Summary Judgment* p. 1.) Both parties filed briefs and submitted affidavits. The matter came before the Court at a virtual hearing on February 7, 2024. (*Tr.* p. 1). James Graham Padgett, III, of the law firm of Bacot & Padgett, LLC, represented the Respondents. (*Id.*) The Appellants were represented by undersigned counsel, and Juankell Shingles of the Juankell Shingles Law Firm. (*Id.*) The Court heard the Respondents' motion for summary judgment and took oral argument from counsel. The evidence presented may be summarized as follows:

A document identified as a "declaration and statement of protective covenants, restrictions and conditions imposed upon Callison Estates, Greenwood County, South Carolina" was recorded in the Office of the Clerk for Greenwood County at Deed Book 259, at pages 185-188, Book 267, at pages 435-438, and Book 267, at pages 439-440 (together, the "Restrictions"). (*Defendants' Responses to Plaintiffs' Requests to* Admit pp. 1-2; *Restrictions* pp. 1-2). It is undisputed that Appellants own and have title to Lot 7 in Callison Estates, and that Respondents

have standing to enforce the Restrictions. (*Compl.* p. 1; *Ans.* p. 2).

The Restrictions provide, in pertinent part:

> 2. All residences erected or located on any lot in [the Callison Estates] Subdivision shall have at least sixteen hundred (1,600) square feet, exclusive of patios, carports, garages and porches.
>
> ...
>
> 9. No commercial vehicles, camper trailers, or house trailers shall be parked or stored on any lot except in the carport or garage or real portion of the said lot.

(*Restrictions* pp. 1-2).

The Restrictions do not define or clarify the phrases "house trailer" or "real portion of the...lot."

It is undisputed that Appellants caused a new olive ScotBilt model 2860 032 with serial number SBHGA12113913AB (the "Residence") to be set up on Lot 7. The Residence was made by a manufacturer, has a hitch, and had axles and wheels which were removed. Respondents' position in these proceedings has been that the Residence is a "house trailer" that is not on the "real portion of the...lot" as those terms are used in the Restrictions, and that it is less than 1,600 square feet, and that therefore its placement is a breach of the Restrictions.

Neither party presented any evidence as to the intent of the original parties to the Restrictions regarding the meaning of the term "real portion of the...lot." Appellants presented the affidavit of Real Estate Agent Larry Morton who stated that the "real portion of the...lot" could be interpreted to mean "anywhere on a lot." (*Affidavit of Larry Morton* p. 1.)

As to the size of the Residence, Respondents presented affidavit evidence, based on the manufacturer's certificate of origin listing the square footage of each half of the Residence as 780 square feet, that the square footage of the Residence was less than 1600 feet. Respondents presented no evidence of the size of the Residence based on any measurements taken *in situ.* Appellants presented the affidavit of Greenwood City/County Planning Director Carol Coleman that she had visited the site of Lot 7 on October 13, 2022, and that the square footage of the

Residence was 1,680 square feet. (*Affidavit of Carol Coleman* p. 1.)

Coleman's affidavit indicates that the Residence was "1,680 square feet, as outlined on the attached sheet that bears my signature and date of visit." *Id.* Attached to Coleman's affidavit was a sheet, signed by Coleman with the note "visited site 10.13.22" and containing a small copy of the manufacturer's specs for the Residence and a table containing the following measurements:

<table>
<tr><td>2.5' step</td><td></td><td></td></tr>
<tr><td>60.25'</td><td>Front</td><td rowspan="2">1,717 sq ft</td></tr>
<tr><td>28.5'</td><td>Right</td></tr>
<tr><td>60.25'</td><td>Rear</td><td rowspan="2">1,702 sq ft</td></tr>
<tr><td>28.25'</td><td>Left</td></tr>
<tr><td colspan="3">28x60= 1680 square feet per plan</td></tr>
</table>

Appellants also submitted their own affidavit verifying that the Residence is more than 1,600 square feet. (*Affidavit of Sudie Davis and Roosevelt Davis* p. 1.)

Following the hearing, at Judge Griffith's request (*Tr.* p. 17), the parties each submitted proposed orders outlining their proposed findings of fact and conclusions of law.

On March 20, 2024, Judge Griffith entered an Order granting the Respondents' Motion for Summary Judgment and ending the case. *Order Granting Plaintiffs' Motion for Summary Judgment.* Judge Griffith found that the Residence was "manufactured home," and therefore a "house trailer" within the meaning of the restrictions. *Id.* pp. 4-5. With regard to whether the Residence was on the "real portion of the lot," Judge Griffith held:

> Paragraph 9 of the 1977 restrictions expressly prohibits the placement of "house trailers" upon the restricted property, unless the house trailer is in a carport or garage or on the real portion of the lot. This 2022 olive ScotBilt model 2860 032 with serial number SBHGA12113913AB manufactured home is not in a carport or garage. The Defendants offered only a conclusory opinion of what the "real portion of the lot" means without support or citation. This conclusory opinion does not create a genuine issue

> of fact, and any inference from this lack of specificity is not reasonable in the Court's analysis.

Id. p. 5.

The Trial Court further reasoned:

> To interpret [the phrase "real portion of the lot"], restriction number 9 must be read as a whole, and with all the restrictions, to gain the intent of the parties.... The Defendants have not given the Court a reasonable interpretation in light of the initial, bright-line prohibition of mobile homes. But, even if they did, while Court should resolve doubts in favor of free use, but this rule is firstly "*subject, however*, to the provision that this rule of strict construction should *not be applied so as to defeat the plain and obvious purpose of the instrument.*" [citation omitted]... The Defendant's position would frustrate the obvious meaning of the restriction, and would, in effect, have the exception subsume the rule in number 9, to prohibit house trailers. The Court cannot envision a circumstance in which a developer would take the time to write a bright-line rule to prohibit mobile homes, just to provide an exception to nullify the rule to allow them. This creates an absurd result. Employing all the rules of statutory construction to the facts of this case, the number 9 of the restrictions prohibits manufactured homes on lot 7. To find the restrictions allowed mobile homes when number 9 clearly states no house trailers (which are mobile homes) on any lot would defeat the plain and unmistakable intent of the parties (to prohibit mobile homes in the subdivision) when reading of the restrictions as a whole.
>
> A finding number 9 allows mobile homes is not reasonable under the facts before me. I find number 9 of the restrictions is not ambiguous...

Id. pp. 8-9.

Furthermore, with respect to whether the Residence had "at least sixteen hundred (1,600) square feet," Judge Griffith relied on the statement in the manufacturer's certificate of origin and plans indicating that the Residence was 1,560 square feet. The Court declined to consider the affidavit of the Director of the Greenwood County Zoning Office stating that the Residence was over 1,600 square feet, holding:

> The Defendants' argument the unit is more than 1,600 square feet fails. The only support offered for this position from the Defendants

> is the affidavit of the Director of the Greenwood County Zoning Office. The affidavit fails to provide any foundation to support the Director's conclusory allegations the unit is over 1,600 square feet. The affidavit lacks any information to support the Director's knowledge, training, skill, and experience with mobile homes generally, and what she was measuring pursuant to the restrictions. Further, the Directors knowledge, training, skill, and experience are in matters of zoning. The dispute before me is not about zoning.
>
> The dispute is about the interpretation of real property restrictions. Zoning regulations are not relevant to what may be the relevant measurements under the restrictions, *e.g.*, what is to be included and excluded in the measurements.
>
> The attachment to the Director's affidavit with measurements contains a set of manufacturer's plans on the same sheet of paper. The manufacturer's plans state that total square footage is 1,560 square feet. These manufacturer's plans were produced by at least one other witness. Finally, the Director's affidavit fails to explain how she is more qualified than the manufacturer, if she is even qualified, to measure the square footage of the unit the manufacturer produced. The Director's measurements are in direct conflict with the manufacturer's plans she seemed to rely upon based on her production of the plans. The Director's conclusions are, therefore, unreliable and do no present a genuine issue of material fact.

Id. pp. 5-6.

The Trial Court further reasoned:

> Defendants rely upon the zoning office. This reliance is misplaced. Zoning approval is irrelevant to the interpretation of the restrictions in this matter. Deed restrictions are wholly independent of any zoning regulation. *See* Greenwood County Zoning Ordinance 13-86 Sec. 6-3-7 ("Public regulation of land is entirely separate from and independent of private deed restrictions. No weight shall be given to the effect of deed restrictions in construing this Ordinance, nor shall this Ordinance be given inappropriate consideration in the construction of deed restrictions"). Furthermore, Greenwood County Zoning provisions defer to the stricter of competing requirements. *See* Id. Sec. 6-3-6(c) ("Whenever this Ordinance imposes a more restrictive standard than required by any other statute, local ordinance or regulation, the provisions of this Ordinance shall govern. Conversely, whenever any statute, local ordinance or regulation imposes a stricter standard than required by this Ordinance, the provisions of such statute, local ordinance or

regulation shall govern.")

Id. p. 9.

At the hearing, the Trial Court speculated about Coleman's credibility, stating, "Let me just point out something that seems obvious to me. Isn't it in the interest of the county or city official to have a little more square footage to get the tax basis up? That house is 1,800 square feet. Here's your tax bill. Thank you for coming." (*Tr.* 17:3-7.)

The Trial Court granted summary judgment on Respondents' claims for breach of contract, and ordered Appellants to remove the Residence from the lot, at their expense, within 90 days. *Id.* p. 12. It dismissed the Appellants' counterclaims.

Appellants moved for reconsideration of the Order granting summary judgment on March 20, 2024. (*Notice of Motion and Motion to Alter or Amend a Judgment*). Judge Griffith entered a form Order denying the Motion for Reconsideration on May 23, 2024. (*Order/Electronic Form 4* p. 1.)

Appellants filed their Notice of Appeal on June 4, 2024. (*Notice of Appeal* p. 1).

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009); see also *S.C. CVS Pharmacy v. KPP Hilton Head*, 440 S.C. 360, 363, 890 S.E.2d 824, 825 (Ct. App. 2023).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment "if the [evidence before the court] show[s] that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (quoting Rule 56[c]). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Callawassie Island Member Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). A court should not resolve a genuine issue of credibility in a motion for summary judgment. *Forrester v. Smith & Steele Builders, Inc.*, 291 S.C. 196, 200, 352 S.E.2d 522, 524 (Ct. App. 1986) (citing 73 Am.Jur.2d Summary Judgment Section 36 (1974).

Our supreme court has addressed the initial burden the moving party carries to succeed on a summary judgment motion:

> A party seeking summary judgment has the burden of clearly establishing by the record properly before the court the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.

Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990).

As the movants on summary judgment, Respondents bore the initial burden to establish a *prima facie* case as to each element of their claim. See *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007).

ARGUMENTS

I. The Trial Court Improperly Failed to hold Respondents to their Burden to Establish the Absence of a Triable Issue of Fact as to Whether Appellants' Residence Was On the "Real Portion" of the Lot.

In order to prevail on summary judgment as to their claims based on an alleged violation of Paragraph 9 of the Restrictions, Plaintiffs must establish entitlement to judgment as a matter of law *both* that the Residence is a "house trailer" *and* that it is *not* on the "real portion of the...lot," as those terms are used in the Restrictions. Setting aside for the moment the question of whether the Residence is a "house trailer," it is clear that disputed issues exist as to whether or not it sits on the "real portion" of the lot.

Words of a restrictive covenant must be given the "common, ordinary meaning attributed to them at the time of their execution." See *Taylor v. Lindsey*, 332 S.C. 1, 4–5, 498 S.E.2d 862, 863–64 (1998); *Marriott Corp. v. Combined Properties Ltd. Partnership*, 239 Va. 506, 391 S.E.2d 313 (1990). See also 20 Am.Jur.2d Covenants § 171 (1995) ("The words of the covenant will be given their commonly held meaning as of the date the covenant was written, not as of some subsequent date."). The construction of a clear and unambiguous contract is a question of law, but if the court determines as a matter of law that the contract is ambiguous, the determination of the contracting parties' intent becomes a question of fact, and evidence may be admitted to show the intent of the parties. See *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *Id.* citing *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) and 17A Am. Jur. 2d Contracts § 338, at 345 (1991).

The Trial Court erred as a matter of law in finding that the phrase "real portion of the...lot" is unambiguous. The phrase "real portion" does not appear to be found anywhere in South Carolina case law, at the time the Restrictions were created or otherwise. The meaning of the phrase is not otherwise apparent from the document. It is not a term of art commonly used in the real estate setting. The Trial Court made no finding as to *what* "real portion" means, but instead appears to have concluded that because the meaning of the phrase is not apparent, it can simply be disregarded and Respondents were relieved of their burden to show that the Residence is not on the "real portion" of the lot. In finding that the "real portion" clause was unambiguous, the Trial Court appears to have simply determined, without requiring Respondents to present *any* evidence on the issue, that the clause was superfluous. This not only improperly relieved Respondents of their burden of persuasion, it contradicted South Carolina contract law. "[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) (citations omitted). Additionally, "restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property." *Taylor*, 332 S.C. at 4–5, 498 S.E.2d at 863–64, citing *McDonald v. Welborn*, 220 S.C. 10, 66 S.E.2d 327 (1951). Although this rule is subject to the provision that it should not defeat the "*plain and obvious* purpose of the instrument," (*Id.*, emphasis supplied), it is not plain, obvious, or even plausible that the original parties to the Restrictions intended the exception they created to be meaningless or ignored outright.

As the parties carrying the burden of proof on their claims for breach of contract, the Respondents bore the burden to submit evidence as to the meaning of the "real portion of

the...lot" intended at the time the Restrictions were enacted, and that the Residence is on that portion of the lot. Absent such proof, no burden shifted to Appellants to provide evidence as to the meaning of the term "real portion," and the Trial Court was required to deny Respondents' motion for summary judgment.[1]

II. The Trial Court Improperly Failed to hold Respondents to their Burden to Establish the Absence of a Triable Issue of Fact as to the Square Footage of the Residence *In Situ*.

In order to prevail on summary judgment as to their claims based on an alleged violation of Paragraph 2 of the Restrictions, Respondents were required to establish the absence of any genuine issue of fact as to whether the Residence was smaller than 1,600 square feet as "erected or located" on the lot. However, the evidence presented by Respondents failed to establish the square footage of the Residence *in situ.* Plaintiffs presented only evidence derived from the manufacturer's specifications. They failed to present evidence that the Residence as it is set up on the lot continues to have such dimensions. They also failed to present evidence that the measurements on the manufacturer's specifications were ever accurate as applied to the Residence. The fact that certain specifications are provided by a manufacturer plainly does not equate to evidence that the product, as actually installed and used, conformed to those specifications. See *Priester v. Futuramic Tool & Eng'g Co.*, No. 2:14-cv-01108-DCN, 2017 U.S. Dist. LEXIS 43988, at *8 (D.S.C. Mar. 27, 2017) (Noting, in the context of manufacturing defect claims, that a defect exists where, *inter alia*, "a product does not conform to the design standards

[1] Nonetheless, Appellants submitted evidence and argument that the word "real" may have been intended to refer to fixed property or land as opposed to personal property, and therefore the phrase "real portion" could be construed to refer to the entire lot. The Trial Court appears to have rejected this interpretation, but neither the court nor Respondents offered any alternate interpretation.

and blueprints of the manufacturer"); *Stratton v. Merck & Co.*, No. 2:21-02211-RMG, 2021 U.S. Dist. LEXIS 223915, at *7 (D.S.C. Nov. 17, 2021)(Same); *Hanwha Azdel, Inc. v. C&D Zodiac, Inc.*, 617 F. App'x 227, 233 n.1 (4th Cir. 2015)(In breach of contract claim, whether Plaintiff's product conformed to specifications was a disputed issue of material fact). Because Respondents never met their burden to establish that the Residence was smaller than 1,600 feet, the burden never shifted to Appellants to present opposing evidence.

Because the Trial Court found that Appellants' Residence, as "erected or located" on the lot, was smaller than 1,600 feet, despite the fact that Respondents presented *no* evidence as to the square footage of the actual Residence *in situ,* the Trial Court improperly held that Respondents had met their burden, and improperly viewed the evidence in the light *least* favorable to Appellants as non-movants for summary judgment.

> A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.

Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990)("All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment.... A party who fails to show the absence of a genuine issue of material fact [as to each element of its claim] is not entitled to summary judgment.")

III. The Trial Court Made a Premature and Improper Credibility Determination in its Finding that the Affidavits of Carol Coleman and Appellants were Insufficient to Raise a Triable Issue of Fact as to the Square Footage of the Appellants' Residence.

Assuming, *arguendo*, that Respondents' evidence of the manufacturer's specifications was sufficient to present *prima facie* evidence that the Residence as "erected or located" on the lot, was smaller than 1,600 feet, Appellants met their burden to present opposing evidence sufficient to raise a genuine question of fact as to the size of the Residence by presenting both their own affidavit and the affidavit of Carol Coleman.

The Trial Court provided no rationale whatsoever for its decision to disregard Appellants' own affidavit, notwithstanding the fact that Appellants are unquestionably personally familiar with the Residence and its dimensions as actually erected or located on the lot. Presumably the Trial Court determined that Appellants' testimony was not impartial due to their interest in the outcome of the case. However, the mere fact that Appellants' affidavit served their position is not a basis to disregard it. See *Protective Life Ins. Co. v. Henderson*, Civil Action No. 1:21-02789-MGL, 2023 U.S. Dist. LEXIS 81028, at *8 (D.S.C. May 8, 2023)("...[S]elf-serving testimony can show a genuine issue of material fact if based on personal knowledge or firsthand experience."); *Pfaller v. Amonette*, 55 F.4th 436, 450 (4th Cir. 2022) ("[S]elf-serving affidavits offered by the non-movant can sometimes defeat summary judgment.").

As to its decision to disregard Coleman's affidavit, the Trial Court provided five rationales, none of which are proper considerations under the Rule 56 standard for summary judgment.

First, the Court held that Coleman's affidavit failed "to provide any foundation to support

the Director's conclusory allegations the unit is over 1,600 square feet." The Court appears to have overlooked or disregarded the table of measurements on the signed notes incorporated by reference into her affidavit, which indicate that she visited the site on October 13, 2022 and measured the dimensions of the Residence as 60.25' (front) x 28.5' (right), resulting in an estimate of 1,717 square feet, and 60.25' (rear) x 28.25' (left), resulting in an estimate of 1,702 square feet. It can be reasonably inferred from the notes that Coleman personally measured the Residence. It can also be reasonably inferred that the annotation "28x60= 1680 square feet per plan" indicates that Coleman's estimate of 1680 square feet was a "lowball" estimate based on "rounding down" the measurements she took. To the extent that the Court assumed that Coleman had no personal knowledge underlying her straightforward factual testimony as to the square footage of the residence, such an assumption (again) improperly viewed the evidence in the light *least* favorable to Appellants, when the Trial Court was required to make the opposite inference. *Standard Fire Ins. Co.*, 301 S.C. at 422, 392 S.E.2d at 462.

Second, the Court held that the affidavit lacked "any information to support the Director's knowledge, training, skill, and experience with mobile homes generally." The Trial Court appears to have held Coleman to a standard applicable to expert witnesses offering opinion testimony, when her testimony was simple lay factual testimony as to the size of a house. Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness's perception, will aid the jury in understanding testimony, and do not require special knowledge. Rule 701, SCRE. Although South Carolina courts have not expressly addressed the issue, courts of sister jurisdictions have overwhelmingly held that lay witnesses may testify about measurements they have taken, when no special

knowledge or skill is required to take the measurements. See *Nicholls v. Andrus Transp. Servs.*, No. 51883-6-I, 2004 Wash. App. LEXIS 1257, at *7 (Ct. App. June 21, 2004) (Permitting lay testimony about the length of skid marks); *State v. Shaw*, 322 N.C. 797, 808, 370 S.E.2d 546 (1988) (Lay testimony permitted about the length of a shoe); *State v. Sequin*, 73 Haw. 331, 342-43, 832 P.2d 269 (1992) (Lay testimony permitted about distance between two landmarks); *Mineros v. London*, No. A-1091-15T4, 2018 N.J. Super. Unpub. LEXIS 1431, at *13 (Super. Ct. App. Div. June 19, 2018) (Lay witness opinions on distances and square footage of rooms were admissible and should have been considered); *Atlas v. Silvan*, 128 N.J. Super. 247, 251, 319 A.2d 758 (App. Div. 1974) (affirming the admission of a lot purchaser's lay testimony about the "size of the property"); *Gretowski v. Hall Motor Exp.*, 25 N.J. Super. 192, 195-97, 95 A.2d 759 (App. Div. 1953) (reversing the exclusion of "the testimony of the witness relative to the widths of the cars and of the traffic lanes and of the relative positions of the vehicles on the highway" because lay witnesses can opine on "height, depth, thickness, [and] width").

Third, the Court held that "the Directors knowledge, training, skill, and experience are in matters of zoning," and that "Zoning regulations are not relevant to what may be the relevant measurements under the restrictions, *e.g.*, what is to be included and excluded in the measurements." Coleman's testimony was not about "zoning regulations" but straightforward testimony as to the square footage of the Residence. To the extent that the Trial Court presumed—without evidence—that the measurements taken by Coleman included portions of the Residence that were to be excluded under the restrictions, the court was (yet again) making unwarranted inferences that were *least* favorable to Appellants.

Fourth, the Court stated that Coleman's measurements were "in direct conflict with the

manufacturer's plans she seemed to rely upon based on her production of the plans," and therefore unreliable. There is no indication in Coleman's affidavit that she "relied upon" the manufacturer's plans in producing her measurement of the property's square footage. The fact that a copy of the plans is included in her notes from the day's visit does not imply that she relied on anything in the plans. As noted above, the dimensions as listed in the manufacturer's specifications are not conclusive as to the dimensions of the Residence *in situ*. The fact that Coleman's measurements of the actual Residence on the lot conflict with the manufacturer's specifications could be because the specifications are simply wrong, or because changes were made to the Residence in actually erecting it on the lot. The existence of conflicting evidence on a material question is a reason to *deny* summary judgment, and certainly a basis to disregard the evidence that favors the non-movant. "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

Finally, at the hearing, the Court speculated about Coleman's credibility, stating that it "seemed obvious" to him that it would be in Coleman's interest to inflate the square footage of the property to increase the tax basis. There was no factual basis for such speculation on the record, and even if there were, "[a] court should not resolve a genuine issue of credibility in a motion for summary judgment." *Forrester*, 291 S.C. at 200, 352 S.E.2d at 524.

CONCLUSION

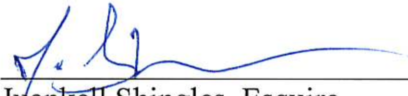
In consideration of the foregoing, Appellants respectfully request that the Trial Court's order granting summary judgment as to Respondents' claims for breach of contract and

requesting injunctive relief be reversed and that this matter be remanded for trial on the merits.

Dated: Sept 11, 2024

Respectfully submitted,

Tommy L. Stanford
Attorney for Appellants
307 Main Street
Greenwood, South Carolina 29646
Mailing: Post Office Box 3321
Greenwood, South Carolina 29648
Phone: (864) 229-3987
Fax: (864) 229-6304
Email: tstanford@tommystanfordlaw.com



Juankell Shingles. Esquire
Attorney for Appellants
Post Office Box 49783
Greenwood, South Carolina 29649
Phone: (864) 376-0914
Fax: (864) 229-6304
Email: jshingles@jshingleslaw.com

RECEIVED
Sep 11 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY

The Court of Common Pleas

Eugene C. Griffith, Jr., Judge

Case No. 2022-CP-24-01036

(Appellate Case No. 2024-000924)

Nancy S. Inman, Lisa Tolbert, and Vernell Humphries, ...Respondents,

v.

Sudie Dell Davis and Roosevelt Davis, ...Appellants.

PROOF OF SERVICE

I hereby certify that on this 11th day of September, 2024, I filed the forgoing Initial Brief of Appellants with the South Carolina Court of Appeals and I served a copy on Ms. Nancy Inman, 101 Callison Drive, Greenwood, South Carolina 29646, by depositing a copy of it in the United States Mail, postage prepaid.

Respectfully submitted,

Tommy L. Stanford
Attorney for Appellants

RECEIVED
Sep 11 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY

The Court of Common Pleas

Eugene C. Griffith, Jr., Judge

Case No. 2022-CP-24-01036

(Appellate Case No. 2024-000924)

Nancy S. Inman, Lisa Tolbert, and Vernell Humphries, ...Respondents,

v.

Sudie Dell Davis and Roosevelt Davis, ...Appellants.

PROOF OF SERVICE

I hereby certify that on this 11th day of September, 2024, I filed the forgoing Initial Brief of Appellants with the South Carolina Court of Appeals and I served a copy on Ms. Lisa Tolbert, 106 Callison Drive, Greenwood, South Carolina 29646, by depositing a copy of it in the United States Mail, postage prepaid.

Respectfully submitted,

Tommy L. Stanford
Attorney for Appellants

RECEIVED
Sep 11 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY

The Court of Common Pleas

Eugene C. Griffith, Jr., Judge

Case No. 2022-CP-24-01036

(Appellate Case No. 2024-000924)

Nancy S. Inman, Lisa Tolbert, and Vernell Humphries, ...Respondents,

v.

Sudie Dell Davis and Roosevelt Davis, ...Appellants.

PROOF OF SERVICE

I hereby certify that on this 11th day of September, 2024, I filed the forgoing Initial Brief of Appellants with the South Carolina Court of Appeals and I served a copy on Ms. Vernelle Humphries, 109 Welborn Ln., Greenwood, South Carolina 29646, by depositing a copy of it in the United States Mail, postage prepaid.

Respectfully submitted,

Tommy L. Stanford
Attorney for Appellants

TOMMY L. STANFORD & ASSOCIATES, PC

ATTORNEY AT LAW

Phone: (864) 229-3987

Physical Address:
307 Main Street
Greenwood, South Carolina 29646

Fax: (864) 229-6304

Mailing Address:
Post Office Box 3321
Greenwood, South Carolina 29648

VIA: ELECTRONIC MAIL (ctappfilings@sccourts.org)

September 11, 2024

RECEIVED
Sep 11 2024
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court for South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: NANCY S. INMAN, LISA TOLBERT, VERNELL HUMPHRIES VS. SUDIE DELL DAVIS AND ROOSEVELT DAVIS
APPELLATE CASE NO.: 2024-000924
INITIAL BRIEF AND DESIGNATION OF MATTER

Dear Madam Clerk:

Please find enclosed the Initial Brief of Appellants, Designation of Matter, and Proofs of Service in reference to the above captioned matter.

Sincerely,

Tommy L. Stanford
Attorney At Law

Enclosures